GOH ENG HWA

v.

MACINTA SDN. BHD., PKNS (GARNISHEE) & INTERVENORS

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CODE NO. S7-23-96-1987]
7 JUNE 1990

CONTRACT: *Garnishee order - Any debts due and accruing - Express forfeiture clause - Jurisdiction - Rescission - Whether contract ended - Performance bond.*

CIVIL PROCEDURE: *Attachment - Garnishee order - Whether debt due and accruing - Whether obligation to pay - Express forfeiture clause - Whether retention sum can be attached - Debt in presenti payable in the future - Contract terminated before garnishee order nisi to show cause.*

On 21 April 1987 the plaintiff, G, obtained default judgment against the defendant, M, in relation to an action for breach of a sub-contract for the construction of certain building project. G then commenced garnishment proceedings against PKNS, with a view to attach all debts due and accuring from PKNS to answer the judgment recovered against the defendant M. The garnishee order nisi to show cause granted by the senior Assistant Registrar was subsequently served on PKNS, on 4th march 1988.

PKNS had entered into three written contracts; only the first Shah Alam project is the subject of this case. PKNS said that on April 1986, M ceased all construction works on the said project; PKNS then by letter terminated the said project with M. The only monies held by PKNS under this contract was a sum of RM145,413 being retention sum and another sum of RM349,613 being security deposit. PKNS then re-awarded the contract for the completion of the said project to M. Prior to the execution of this second Shah Alam contract, the garnishee order was served on PKNS. Also prior to this, M had sought PKNS's consent to assign absolutely the second Shah Alam contract to SW. Pursuant to a condition in relation to PKNS retaining a certain sum out of the security deposit as payment of the garnishee order in the event it became absolute, PKNS and M executed the second Shah Alam contract; the related deed of assignment was also executed between M and SW.

PKNS retained RM130,000 out of the security deposit and released the remainder to M.

The garnishee order nisi to show cause was made absolute by the Senior Assistant Registrar on 29 October 1989 who held that the sum of RM145,000 and RM344,000 were debts due and accruing from PKNS to M; PKNS was also ordered to pay G a sum of RM114,000. Dissatisfied with the decision, PKNS lodged an appeal; however it paid a certain amount of money to G.

SW applied to intervene in the garnishment proceedings, arguing that pursuant to clause 37(i)(iv) of the first Shah Alam project contract, no payment was payable to M as they had failed to complete the project and that PKNS was entitled to deduct any sums payable to M so as to pay the persons employed to complete the Shah Alam project; furthermore, M had assigned this sum to SW and the sum of RM145,000, as it was a sum not yet due and accruing, could not be taken in execution. Further PKNS had terminated the contract before the garnishee order nisi was served on it.

The question for determination is whether, as a result of the first Shah Alam prject having been terminated even before G had obtained and served the garnishment order nisi, there were any monies at all due and accruing from PKNS to M; taking into account clause 37(c)(iv) of the first contract. This clause was an express forfeiture clause which empowered PKNS, in certain circumstances, to determine the said contract and to exercise other rights over the works and property of the judgment debtor. PKNS also entered into a performance bond with Amanah Chase Merchant Bank Bhd., A, for indemnification of RM349,000.

Held:

[1] (a) The reason for the termination of the earlier contract was because of the wrongful and unjustified suspension and stoppage of all construction works in respect of the Shah Alam Project by G.

(b) It therefore amounted to the repudiation of the first Shah Alam Contract by G which repudiation was accepted by PKNS resulting in the rescission of the said contract;

(c) The first Shah Alam contract had come to an end and PKNS was no longer required to perform its contractual obligations or carry out any of the contractual terms and conditions of the said contract.

[2] (a) Rescission or acceptance of the repudiation means that the party invoking the remedy is thereafter relieved of any obligation to perform it further.

(b) There is no obligation on the part of PKNS to pay the retention sum to G in the circumstances of this case particularly because of clause 37(c)(iv).

(c) G could not itself sue for the retention sum and as the defendant acquires no greater rights than those of G, the retention sum cannot be attached.

(d) It is not enough to show that it is very probable that there soon will be a debt owing by PKNS to G; it must be shown that there is a debt *in presenti* payable in the future.

(e) Although the retention sum had been earned by G nevertheless by repudiating the first Shah Alam contract through its default clause 37(c)(iv) it was prohibited from recovering the retention money.

(f) There is therefore no debt or accruing debt due from PKNS to G which it could enforce in law particularly when the rescission of the first Shah Alam contract was terminated even before the judgment creditor could obtain a garnishee order nisi to show cause.

[3] PKNS had every right under the bond executed between PKNS and A to require the latter to indemnify the former the sum of RM349,613.12 upon a demand made to A. That cannot in any case be deemed to be a debt as accruing due from PKNS to the judgment creditor as the transaction is solely between A and PKNS.

[Order of SAR reversed.]

Cases referred to:

Heyman v. Darwins [1942] AC 356
Kedah Kelang Papan Sdn. Bhd. v. Hansol Sdn. Bhd. [1988] 1 CLJ (Rep) 645
Grant Plant Hire v. Trickey [1961] Vol 105 SJ 255
Harbottle (Mercantile) Ltd. v. National Westminster Bank [1972] 2 All ER 262

For the Plaintiff - Low Eu Thuan; M/s. Suhaimi Khor Zulkifli & Chang
For the Garnishee - Grace Lim Poh Geok; M/s. Rashid & Lee
For the 2nd Applicant - Mazlinda bte Makhzan; M/s. Ng Yook Woon, Andrew T.C. Saw & Co.

JUDGMENT

Lim Beng Choon J:

By its writ action dated 6 March 1987, the plaintiff claimed against the defendant for breach of a sub-contract for the construction of a certain building project. The plaintiff claimed that the defendant had failed, refused and/or neglected to pay the latter the sum of RM114,156.20 for the completed and extra works which had been submitted to and certified by the project engineer. No appearance was entered by the defendant and a certificate of non-appearance was certified and filed by the plaintiff on 21 April 1987. Judgment in default of appearance was duly granted to the plaintiff against the defendant on the same day.

On 10 September 1987 the plaintiff (hereinafter referred to as "the judgment creditor") commenced garnishment proceeding against Perbadanan Kemajuan Negeri Selangor (PKNS) with a view to attach all debts due and accruing from PKNS to answer the judgment recovered against the defendant (hereinafter referred to as "the judgment debtor") for the sum of RM114,156.20 with interest thereon at the rate of 6% p.a. from 6 March 1987. The garnishee order nisi to show cause was granted by the Senior Assistant Registrar of this Court ('the SAR') on 15 October 1987 and it was duly served on PKNS on 4 March 1988. The judgment creditor also instituted garnishment proceedings against two other garnishees but the proceedings against them were abandoned.

In its reply to the show cause order the Assistant Financial Controller of PKNS affirmed an affidavit on 3 May 1988 in which it was averred *inter alia* that PKNS had entered into three written contracts for the construction of certain building in three projects namely the Kuala Langat Project, the Shah Alam Project and the Bangi Project. As the judgment creditor is interested to attach all debts due and accruing by PKNS to the judgment creditor only in respect of the Shah Alam Project nothing need to be said about the other two projects. According to the said Assistant Financial Controller the Shah Alam Project was carried out pursuant to the Contract No. PKNS/BBS/KD5-2 of 1985 (the first Shah Alam Contract). However on or about April 1986 the judgment debtor without the consent of PKNS ceased all construction works. Pursuant to the aforesaid breach PKNS by its letter dated 17 November 1986 terminated the first Shah Alam Contract with the judgment debtor. The only moneys held back by PKNS under that contract was a sum of RM145,413.58 being retention sum and another sum of RM349,613.42 being security deposit.

I should in passing also mention that on 20 August 1988 Talasco Insurance Sdn. Bhd. ('Talasco') applied to intervene in the garnishment proceeding with a view to restrain PKNS from paying out the sum retained by the latter in the form of security deposit to anybody. However as Talasco had also abandoned its application to intervene I need not say anything more about the said application apart from referring to certain assertions made by the Assistant Financial Controller of PKNS in his second affidavit affirmed on 7 September 1988 which have a bearing in the contest between the judgment creditor and PKNS. It appeared that subsequent to the termination of the first Shah Alam Contract, a decision was made by PKNS to re-award a contract for the completion of the Shah Alam Project to the judgment debtor subject to certain terms and conditions. Prior to the execution of this second Shah Alam Contract, the garnishee order nisi to show cause dated 15 October 1987 was served on PKNS on 4 March 1988. Also prior to the execution of the second Shah Alam Contract, the judgment debtor had sought the consent of PKNS to assign the second Shah Alam Contract absolutely to one Sungei Way Quarry Industries Sdn. Bhd. (Sungei Way). PKNS, however, would not consent to the said assignment unless the judgment debtor agreed *inter alia* to authorise

PKNS to retain a sum sufficient to satisfy the said garnishee order nisi (if made absolute) out of the security deposit sum of RM349,613.42 which was supposed to be released to the judgment debtor under the terms of the second Shah Alam Contract. The judgment debtor agreed to PKNS's suggestion and further stated that in the event that the said garnishee order nisi was set aside the sum sought to be retained by PKNS from the security deposit should be released to the judgment debtor. Pursuant to this agreement the second Shah Alam Contract was executed between PKNS and the judgment debtor on 5 July 1988. The deed of assignment of the second Shah Alam Contract was executed between the judgment debtor and Sungei Way on 6 July 1988. As authorised by the judgment debtor, PKNS therefore retained a sum of RM130,000 out of the security deposit of RM349,613.42 (to account for the present garnishment proceeding if made absolute). The remaining sum under the security deposit was released to the judgment debtor.

The garnishee order nisi to show cause was made absolute by the SAR on 29 October 1988 who held that the sum of RM145,413.58 being retention money and the sum of RM349,613.32 being security deposit held by PKNS were debts due and accruing from PKNS to the judgment debtor and the two sums should be attached. The SAR also ordered PKNS to pay the judgment creditor the judgment sum of RM114,156.20 together with interest and cost.

Being dissatisfied with the whole decision of the SAR, PKNS lodged a notice of appeal on 2 November 1988. However on 12 December 1988 PKNS paid the sum of RM129,971.68 to the judgment creditor pursuant to the order absolute and execution proceedings which had been instituted against PKNS.

On 29 May 1989 Sungei Way applied to intervene in the garnishment proceedings. From the two affidavits affirmed by the general manager (construction) of Sungei Way on 27 May 1989 and 22 June 1989 respectively the grounds relied by Sungei Way to intervene appear to be these. First it was said that as PKNS had terminated the first Shah Alam Contract "**before** the garnishment summons herein was served on the garnishee," then pursuant to clause 37(i)(iv) of the said contract "no payment would be made to the contractor under the contract." Hence nothing was due and payable to the judgment debtor. Alternatively PKNS was as of the date of termination entitled to deduct any sums payable to the judgment debtor under the said contract and to pay such sums as might be necessary to those persons employed to complete the Shah Alam project. Then it was said that in any case upon entering into the second Shah Alam contract the judgment debtor had absolutely assigned the same to Sungei Way and the deed of assignment executed between the parties on 6 July 1988 with the consent of PKNS became effective as on that date. It was then contended that the sum of RM145,413.58 being a sum which was not yet due or accruing due could not be taken in execution.

At the postponed hearing of the appeal of PKNS on 27 June 1989 I was informed by Counsel for the garnishee (PKNS) that one Chua Ah Pong (Chua) and a firm known as Ha Ta Piling Construction Sdn. Bhd. (Ha Ta) had each served a garnishee order to show cause against PKNS on 3 May 1989 and 26 January 1989 respectively. The garnishment proceedings commenced by Chua and Ha Ta arose from Klang Sessions Court Summons Civil Suits. To give them an opportunity to be heard I therefore directed them to attend when this appeal next came on for hearing.

I do not propose to set out the submissions of the Counsel acting for the respective parties although their submissions have been of much assistance to me and they have cited quite a number of authorities. I propose to take this step simply because the only crucial question posed to me is that since the first Shah Alam Contract had been terminated even before the

judgment creditor had obtained and served the garnishee order nisi to show cause were there any moneys at all due or accruing due from PKNS to the judgment debtor particularly when clause 37(c)(iv) of the said contract provided that:

> **Until completion of the works under this clause no payment shall be made to the contractor under this contract**; provided that, upon completion as aforesaid and the verification within a reasonable time of the accounts therefore, the Superintending Officer shall certify the amount of expenses properly incurred by Government; and if such amount added to the moneys paid to the Contractor before such determination exceeds the total amount which would have been payable on due completion the difference shall be a debt payable to Government by the Contractor; and if the said amount added to the said moneys be less than the said total amount the difference shall be a debt payable by Government to the Contractor. (Emphasis is mine).

It is to be noted that clause 37 is an express forfeiture clause empowering PKNS, in certain specified events such as when the judgment debtor wholly suspended the works or failed to complete the same, to determine the said contract and to exercise other rights over the works and property of the judgment debtor.

Before answering the question posed to this Court it is important to find out as to why the first Shah Alam contract was terminated. From a scrutiny of the recital set out in the second Shah Alam contract, it can be seen that the reason for the termination of the earlier contract was because of the wrongful and unjustified suspension and stoppage of all construction works in respect of the Shah Alam Project by the judgment debtor. At the time of termination the judgment debtor had completed only 22% of the works. It therefore amounted to the repudiation of the first Shah Alam contract by the judgment debtor which repudiation was accepted by PKNS resulting in the rescission of the said contract. That being the case the first Shah Alam contract had come to an end and PKNS was no longer required to perform its contractual obligations or carry out any of the contractual terms and conditions of the said contract. In support of this proposition I would refer to the case of *Heyman v. Darwins* [1942] AC 356. In that case the House of Lords had to consider the exact nature of the right to treat a contract as repudiated. It was there stated that, just as in the case of anticipatory breach, in the case of a breach while the contract was partly performed a party could accept the repudiation and sue for damages. Rescission or acceptance of the repudiation means that the party invoking the remedy is thereafter relieved of any obligation to perform it further although the House of Lords was of the view that the provisions relating to the handling of disputes by arbitration continued to have effect. In holding that the arbitration clause had not been abrogated Lord Macmillan said at pp. 373-374 of the reported case:

> I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde*, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement. Moreover, there is the further significant difference that the 'Courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contract.

> I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

It is clear from the aforementioned passage of the judgment of Lord Macmillan that although the arbitration clause is so to speak a neutral provision which sets out a machinery to refer any disputes under the contract to arbitration which is enforceable under the statute on arbitration nevertheless all further performance of the obligations undertaken by each party in favour of the other would cease. Lord Wright in the same case supports this proposition when he said at p. 379 of the reported case that:

> But perhaps the commonest application or the word repudiation is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such case, if the repudiation is wrongful and the rescission is rightful, **the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation.** (Emphasis is mine).

Applying the principles stated in the abovementioned authority I have no hesitation in holding that there is no obligation on the part of PKNS to pay the retention sum to the judgment debtor in the circumstances of this case particularly because of clause 37(c)(iv). The judgment debtor could not itself sue for the retention sum and as the judgment creditor acquires no greater rights than those of the judgment debtor, the retention sum cannot be attached. It is not enough to show that it is very probable that there soon will be a debt owing by PKNS to the judgment debtor; it must be shown that there is a debt in *presenti* payable in the future - see *Kedah Kelang Papan Sdn. Bhd. v. Hansol Sdn. Bhd.* [1988] 1 CLJ (Rep) 645 at 649. In further support of this proposition I would rely on the principle laid down in *Grant Plant Hire v. Trickey* [1961] Vol. 105 SJ 255. In that case a local authority contracted on 7 November 1958 with T to build flats estimated to cost about £40,000. Under its provisions the architects gave certificates from time to time and payment was made to T of 90% of the amount due, 10% being retained in the Council's hands against possible later complaints and claims. By clause 19 it was provided that if the contractor defaulted and the contract was terminated by the Council the employers were not bound by any provisions to make payment to the contractor. By 16 May 1960 some £17,000 had been spent and accordingly some £1,700 was retained by the Council. On 27 May 1960 the Council terminated the contract in accordance with clause 19 because of T's default. On 28 May one of T's subcontractors, who had on, 25 May 1960 obtained judgment against him for £392, 18s.8d. issued a summons in the county Court against the Council asking for a garnishee order in respect of that amount. The county Judge made the order asked for. The Council appealed. In reversing the order of the county Court Judge UpJohn LJ said:

> The position here was that by 28 May, when the summons was served on the Council, the contract with T had been determined and under clause 19 of the contract nothing became due as a present debt from the Council to T at all. The work had still to be completed and when it was done the architect had to certify the expenses incurred and work out the figures to see

whether a balance was due from Council to contractor or *vice versa*. Not until then was there a debt payable by the Council, and until the architect had issued his certificate it could not be said for the purposes of attachment that anything was due.

In the present case although the retention sum had been earned by the judgment debtor nevertheless by repudiating the first Shah Alam contract through its default clause 37(c)(iv) prohibits it to recover the retention money. There is therefore no debt or accruing debt due from PKNS to the judgment debtor upon which it could enforce in law particularly when the rescission of the first Shah Alam contract was terminated even before the judgment creditor could obtain a garnishee order *nisi* to show cause. It is also important to note that there is no allegation that the termination of the said contract was made fraudulently to defeat the claim of the judgment creditor.

As regards to the performance bond, PKNS had every right under the bond executed between PKNS and Amanah Chase Merchant Bank Bhd. to require the latter to indemnify the former the sum of RM349,613.12 upon a demand made to the said bank. That sum cannot in any case be deemed to be a debt as accruing due from PKNS to the judgment creditor. The transaction is solely between the said bank and PKNS - see *Harbottle (Mercantile) Ltd. v. National Westminster Bank* [1977] 2 All ER 262. In any event there has been no complaint from the said bank in paying out the money.

For the above reasons, the decision of the SAR making the garnishee order absolute is reversed. Costs of the proceedings are to be paid by the judgment creditor to PKNS.

Also found at [1991] 1 CLJ 535